

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

WILLIAM J. COCKRELL, BILLY H.  
COCKRELL, AND CAROLYN V. COCKRELL

PLAINTIFFS

V.

CAUSE NO. 2:95CV016-B-B

MEMPHIS-SHELBY COUNTY AIRPORT  
AUTHORITY, PRESIDENT LARRY COX,  
BOARD MEMBERS, ET AL., CITY OF  
SOUTHAVEN, MISSISSIPPI, MAYOR  
JOE CATES, BOARD OF ALDERMAN,  
ET AL., DESOTO COUNTY SPECIAL  
COURT OF EMINENT DOMAIN,  
MISSISSIPPI, ET AL., JOE WEBSTER,  
ET AL., D.B. BRIDGEFORTH, ET AL.,  
TAYLOR BUNTIN, ET AL., JUDY KITCHENS,  
ET AL.,

DEFENDANTS

**MEMORANDUM OPINION**

This cause is presently before the court on the motions of the defendants for summary judgment. Upon due consideration of the defendants' motions, the plaintiffs' responses thereto, and the memoranda submitted by the parties, the court is prepared to rule.

The plaintiffs filed this action pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) for alleged violations of the plaintiffs' civil rights under the First, Fourth, Sixth, Seventh, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("URA"), 42 U.S.C. § 4601 et seq., seeking damages against the defendants in excess of \$200,000,000.00. The complaint seeks redress from a city condemnation of the plaintiffs' home in Desoto County, Mississippi, which is now dedicated for use as part of a public park, and from the continuing overflights of aircraft over their property.

In 1986 the Memphis-Shelby County Airport Authority ("Airport") developed a noise compatibility program to purchase surrounding real estate pursuant to federal guidelines for certain property located in an area of high air traffic noise. Approximately 59 acres of this "buyout area" was located in Desoto County, Mississippi. The Airport eventually purchased all but three residences in the Mississippi portion of the buyout area. The plaintiffs' residence was located within this area and they refused to sell.

In 1993, the Airport entered into negotiations with the City of Southaven ("City") concerning the donation of the property owned by the Airport in Mississippi to the City so that the City could make use of the land as a public park. The City contemplated instituting condemnation proceedings to acquire the remaining parcels that were located in the area so that the park could be properly developed. The Airport agreed to provide the City with funds to acquire the remaining property because the City's condemnation of the property for use as a public park was consistent with the Airport's objective of "eliminating non-conforming property usage within the area determined to be most impacted by aircraft operations."

The City determined that in order to use the 59 acres to be conveyed by the Airport as park land, it would be necessary to acquire the three remaining residential properties. On February 1, 1994, the City adopted a resolution declaring that public use and convenience required the City to exercise its power of eminent

domain as to the plaintiffs' property. By written agreement, the Airport agreed to convey to the City all of the vacant property which it had acquired through the buyout program and the City agreed to accept the same and to preserve the property as park land for a period of not less than 20 years. The Airport agreed to reimburse the City for expenses incurred in the condemnation of the three remaining residential lots.

These proceedings were instituted by the plaintiffs' on February 2, 1995. On March 2, 1995, the Special Court of Eminent Domain entered a judgment upon a jury verdict awarding the plaintiffs \$66,000.00 as just compensation for the taking of their property.

On January 11, 1996, this court dismissed the claims against the Board of Alderman of the City of Southaven in their individual capacities based on a failure to state a cognizable constitutional claim. The court dismissed the Board of Commissioners of the Airport in their individual capacities for lack of personal jurisdiction. The court also dismissed Judge Joe Webster on the grounds of judicial immunity. The plaintiffs have appealed from those and other decisions, an appeal which is currently pending before the Fifth Circuit. The court, however, retains jurisdiction over those claims and/or parties not presently before the Court of Appeals.

#### **STANDARD FOR SUMMARY JUDGMENT**

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be resolved in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986). The defendants have made the necessary "showing" that there exists no genuine issue of material fact. However, the plaintiffs dispute, albeit in conclusory fashion, each and every allegation made by the defendants in their itemization of facts. Their affidavit contains vague legal conclusions and cannot

oppose a properly supported summary judgment motion. Thus, the court finds the facts stated in this opinion not genuinely in dispute.<sup>1</sup>

#### **I. CLAIMS AGAINST THE AIRPORT**

The plaintiffs have asserted against the Airport two distinct causes of action. The first claim seeks damages allegedly suffered by the plaintiffs as a result of low flying aircraft invading their airspace and generating high levels of noise, thereby depriving them of the peaceful use and enjoyment of their property. The second claim seeks money damages for injuries allegedly suffered by the plaintiffs as the result of the Airport's participation with the City in a conspiracy to deprive the plaintiffs of their property by the institution of an eminent domain proceeding. In other words, the plaintiffs first seek damages on the theory that the Airport took the plaintiffs' property without just compensation, while the second claim is that the City should not have taken their property and paid the plaintiffs just compensation.

With respect to the first of these claims, the Airport's sole basis for the summary judgment motion is that any actions alleging injuries sustained from aircraft intrusions and noise are barred by

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<sup>1</sup>The plaintiffs' do not respond to the substantive allegations and factual rendition of the defendants beyond general denials; instead, they have apparently reiterated their request for a Rule 56(f) continuance. The plaintiffs' sole argument for the denial of the summary judgment motion is that the specific time period allotted for discovery under the scheduling order has not elapsed. The court denies the request for the same reasons indicated in its January 11, 1996 Memorandum Opinion at 2 n.1.

the applicable statute of limitations. As there is no statute of limitations in a § 1983 action, federal courts borrow from the forum state's general personal injury statute of limitations. See Owens v. Okure, 488 U.S. 235, 236, 102 L. Ed. 2d 594 (1989); Gates v. Walker, 865 F. Supp. 1222, 1230 (S.D. Miss. 1994), aff'd, 62 F.3d 394 (5th Cir. 1995).

The defendants contend that the plaintiffs' cause of action accrued on the date of the first injury -- over twenty years ago. To support this contention, the defendants attach a complaint filed by the plaintiffs in 1989 alleging essentially the same cause of action. The complaint alleges that aircraft have been flying over the plaintiffs' property and violating their rights to the use and enjoyment of their property no later than 1974. This complaint was dismissed without prejudice for failure to pay the filing fee. Thus, the defendants argue that Mississippi's general six-year statute of limitations precludes this action. Miss. Code Ann. § 15-1-49 (1972) (prior to the 1989 amendment changing the limitations period to three years).

The court is not persuaded that the statute of limitations bars this action. "[W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and the limitations begins to run from the date of the last injury, or when the tortious acts cease." C.J.S., Limitations of Actions § 177 at 230; see also Steven v. Lake, 615 So. 2d 1177, 1183 (Miss. 1993). This action is more aptly construed to be a "continuing tort" which can give rise to liability even if the injuries persist beyond the

limitations period for the initial injury. "A 'continuing tort' is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action." Id.; see also Hendrix v. City of Yazoo City, 911 F.2d 1102 (5th Cir. 1990) (explaining that where violation occurs outside limitations period but is closely related to violations occurring within the period, recovery is permitted on the theory that all violations are part of one continuing act). The court therefore finds that the defendants' motion as it relates to this cause of action should be denied.

The second claim against the Airport was for allegedly conspiring to violate the plaintiffs' rights by providing funds to the City for use in connection with eminent domain proceedings. The court previously addressed this issue as it related to the City's officials and concluded that there was no constitutional or statutory grounds for relief. See January 11, 1996 Memorandum Opinion. For the reasons stated in that opinion, the court will dismiss the § 1983 "conspiracy" claim against the Airport.

In addition, the plaintiffs have asserted a 42 U.S.C. § 1985(3) conspiracy claim apparently against all the defendants herein. This cause of action will be dismissed in its entirety for two reasons. First, this section does not create a substantive right of action, but merely provides a remedy for an independent constitutional violation. Koch v. Mirza, 869 F. Supp. 1031 (W.D.N.Y. 1994); McLellan v. Mississippi Power & Light, 545 F.2d 919 (5th Cir. 1977). As the court has concluded there exists no

independent constitutional cause of action, there can be no conspiracy to deprive the plaintiffs of the same. Second, this statutory section governs only class-based discriminatory actions. Senegal v. Jefferson County, 785 F. Supp. 86 (E.D. Tex.), aff'd, 1 F.3d 1238 (5th Cir. 1992). The plaintiffs have failed to allege that they were the victims of racial or class-based animus and, thus, are precluded from raising a § 1985 claim. Id.

## **II. CLAIMS AGAINST THE CITY OF SOUTHAVEN**

The plaintiff's allegations, as they relate to the City defendants, can be condensed and summarized as follows: (1) that the City is not a properly created municipality because of a defective charter and, therefore, the City did not have the power to institute eminent domain proceedings; (2) that the defendants conspired with officials from the Airport to violate the URA by providing funds to the City for the eminent domain proceedings against the plaintiffs; (3) that the eminent domain proceedings were instituted in the wrong court; (4) that the defendants violated their First Amendment right when the City condemned their property but left untouched a nearby church.

These issues were also addressed by the court in its January 11, 1996 Memorandum Opinion. The court ruled that the plaintiffs did not state a claim upon which relief could be granted against the Board of Alderman. Those same claims raised against the City itself, its attorneys, and appraiser fare no better. For the reasons stated in the court's previous opinion the claims against the City, its attorneys (Bridgeforth and Buntin), and the real



estate appraiser (Kitchens) fail to state a cognizable constitutional cause of action. Accordingly, the claims and the parties will be dismissed. An order will issue.

THIS, the \_\_\_\_ day of June, 1996.

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**NEAL B. BIGGERS, JR.**  
**UNITED STATES DISTRICT JUDGE**